Public Prosecutor v Muhamad Zaid bin Zainal

HIGH COURT (PULAU PINANG) — CRIMINAL REVIEW NO 43–2–02 OF 2013
ZAMANI A RAHIM J
30 APRIL 2013

Criminal Law — Penal Code — ss 447 and 511 — Criminal trespass, attempted — Plea of guilty entered under erroneous view of law — Failure to disclose identity of owner of house in question — Failure to state mens rea of offence in the charge — Whether imprisonment of seven months not in accordance with law and ultra vires

Criminal Procedure — Charge — Defective charge — Attempted criminal trespass — Failure to disclose identity of owner of house in question — Failure to state mens rea of offence in the charge — Failure to state mens rea of offence in the charge — Whether charge seriously flawed — Multiple defects not curable under s 422 of the Criminal Procedure Code

Criminal Procedure — Plea of guilty — Revision — Plea of guilty entered under erroneous view of law — Notes of proceedings not stating whether plea of guilty was unqualified, unequivocal and was accepted by magistrate

Criminal Procedure — Revision — Powers of High Court — Application for revision — Attempted criminal trespass — Plea of guilty entered under erroneous view of law — Failure to disclose identity of owner of house in question — Failure to state mens rea of offence in the charge

Criminal Procedure — Sentencing — Excessive sentence — Attempted criminal trespass — Charge under Penal Code ss 447 and 511 — Maximum imprisonment term imposable only up to three months — Whether imprisonment of seven months not in accordance with law and ultra vires

The respondent and OKT1 were charged at the magistrate's court on a charge of an attempted criminal trespass, an offence punishable under s 447 and s 511 of the Penal Code ('Code'). Both of them claimed trial to the charge. Subsequently however, the respondent changed his plea to one of guilty. The learned deputy then tendered written facts of the case ('P1'). P1 was read to the respondent in Bahasa Malaysia which he admitted to be true. The respondent was then found guilty and convicted and was sentenced to seven months

imprisonment from the date of arrest. The High Court was asked to revise the sentence of seven months imprisonment imposed by the magistrate.

Held, setting aside the conviction and sentence and acquitting and discharging the respondent:

(1) The notes of evidence did not show that the magistrate was satisfied that the respondent's plea of guilty was unqualified, unequivocal and the plea was accepted by the magistrate. This should be done after the accused has admitted the facts of the case tendered by the prosecution to be true (see para 16).

(2) The magistrate too must verify that the statement of facts, P1 should be supportive of the charge. In this case, P1 did not disclose who was the owner of the house in question which was an essential ingredient of an offence under s 477. Instead the facts emphasised on the identity and address of the complainant. The facts did not state the nexus between the respondent and the attempted crime and whether there was common intention (see paras 18 & 20).

(3) The charge in this case was under the provisions of s 447/511 of the Code read together with s 34 of the same Code. The punishment for criminal trespass is imprisonment which may extend to six months, or with fine which may extend to three thousand ringgit or with both. When s 447 is read with s 511, the maximum imprisonment term imposable for an offence of an attempted criminal trespass is one that may extend to three months and not six months as understood by the Magistrate. As from the date of his arrest, 6 November 2012 up to the date of his conviction and sentence by the magistrate on 8 February 2013, the Respondent had already served his sentence for a period of three months and two days, thus exceeding two days of his maximum sentence under s 447/511. Therefore the imprisonment term of seven months imposed by the magistrate was not in accordance with the law and therefore illegal. It was ultra vires (see paras 24 & 27).

(4) The charge was seriously flawed or bad in law. The charge did not state the mens rea or intent of the offence. The charge was also bad in law because improper word(s) or expression(s) were incorporated in the charge. The respondent's plea of guilty was entered under an erroneous view of the law, his conviction could not stand. The charge was fundamentally defective and the defects which were multiple were not curable under s 422 of the Criminal Procedure Code (see paras 29, 31–32).

[Bahasa Malaysia summary

Responden dan OKT1 telah dituduh di mahkamah majistret atas tuduhan cubaan jenayah ceroboh, kesalahan yang boleh dihukum di bawah s 447 dan

s 511 Kanun Keseksaan ('Kanun'). Kedua-duanya menuntut perbicaraan terhadap tuduhan. Walau bagaimanapun, selanjutnya, responden menukar akuannya kepada bersalah. Timbalan yang bijaksana kemudian mengemukakan fakta-fakta bertulis kes ('P1'). P1 telah dibacakan kepada responden dalam Bahasa Malaysia yang mana dia mengakui adalah benar. Responden kemudiannya didapati bersalah dan disabit dan dihukum penjara selama tujuh bulan dari tarikh dia ditahan. Mahkamah Tinggi telah diminta untuk menyemak hukuman penjara tujuh bulan yang dikenakan oleh majistret.

Diputuskan, mengetepikan sabitan dan hukuman dan melepaskan dan membebaskan responden:

(1) Nota-nota keterangan tidak menunjukkan majistret berpuas hati bahawa akuan bersalah responden adalah tidak berkelayakan, tidak bercanggah dan akuan telah diterima oleh majistret. Ini sepatutnya dilakukan selepas tertuduh telah memasukkan fakta-fakta kes yang ditender oleh pihak pendakwaan sebagai benar (lihat perenggan 16).

(2) Majistret juga harus menentusahkan penyataan fakta, P1 seharusnya menyokong tuduhan. Dalam kes ini, P1 tidak mengemukakan siapakah pemilik rumah yang dipersoalkan yang mana merupakan intipati penting kesalahan di bawah s 477. Sebaliknya fakta-fakta menekankan identiti dan alamat pengadu. Fakta-fakta tidak menyatakan hubungan di antara responden dan cubaan jenayah dan sama ada terdapat niat bersama (lihat perenggan 18 & 20).

(3) Tuduhan kes ini di bawah peruntukan s 447/511 Kanun dibaca bersama s 34 Kanun yang sama. Hukuman untuk jenayah pencerobohan adalah pemenjaraan yang mana dilanjutkan kepada enam bulan, atau dengan denda yang mana boleh dilanjutkan kepada tiga ribu ringgit atau kedua-duanya sekali. Apabila s 447 dibaca dengan s 551, tempoh pemenjaraan maksimum yang dikenakan untuk kesalahan cubaan jenayah ceroboh adalah yang boleh dilanjutkan kepada tiga bulan dan bukan enam bulan seperti yang difahami oleh majistret. Dari tarikh penahanannya, 6 November 2012 sehingga tarikh sabitannya dan hukuman oleh majistret pada 8 Februari 2013, responden telah menjalani hukumannya untuk tempoh tiga bulan dan dua hari, justeru melebihi dua hari hukuman maksimum di bawah s 447/511. Oleh itu tempoh pemenjaraan tujuh bulan yang dikenakan oleh majistret adalah tidak mengikut undang-undang dan oleh itu adalah menyalahi undang-undang. Ia adalah ultra vires (lihat perenggan 24 & 27).

(4) Tuduhan adalah dengan serius cacat atau salah dari segi undang-undang. Tuduhan tidak menyatakan mens rea atau niat kesalahan. Tuduhan juga adalah salah dari segi undang-undang kerana perkataan-perkataan atau gambaran yang tidak sesuai dimasukkan di dalam tuduhan. Akuan

bersalah responden telah dimasukkan di bawah pandangan undang-undang yang salah, tuduhannya tidak boleh bertahan. Tuduhan adalah secara dasarnya cacat dan kecacatan yang berganda tidak dapat dibaik pulih di bawah s 422 Kanun Tatacara Jenayah (lihat perenggan 29, 31–32).]

Notes

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1318–1360.

For cases on excessive sentence, see 5(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4318–4343.

For cases on powers of High Court, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3598–3626.

For cases on revision, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3018–3022.

Cases referred to

Abd Rashid Abdullah & Anor v PP [2012] MLJU 1427; [2013] 2 AMR 484, HC (refd)

Basri Md Desa v PP [2010] MLJU 1030; [2011] 1 CLJ 884, HC (refd)

Choong Loke Kian dan satu lagi v Pendakwa Raya [2013] 1 MLJ 436; [2012] 1 LNS 176, HC (refd)

Lim Hong Siang v PP [2009] 3 MLJ 280, HC (refd)

Mohammad bin Hassan v PP [1998] 5 MLJ 65, HC (refd)

Ng Yu Wah v PP [2012] 9 MLJ 325; [2012] 4 CLJ 494, HC (refd)

PP lwn Mohamad bin Sabu [2012] 7 MLJ 547; [2011] 6 AMR 250, HC (refd)

PP v Mohd Azam bin Basiron & Anor [2011] 3 MLJ 741; [2010] 9 CLJ 1, CA (refd)

Takrip dan Sembilan Belas Orang Yang Lain v Pejabat Imigresen Negeri Melaka [2004] MLJU 359; [2004] AMR 698, HC (refd)

Legislation referred to

Criminal Procedure Code ss 51A, 422

Penal Code ss 34, 379A, 380, 441, 447, 448, 511

Maziah (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Respondent acted in person.

Zamani A Rahim J:

[1] This court was referred to a letter dated 8 December 2013 from the magistrate's court at Jawi seeking this court to revise the sentence of seven

months imprisonment imposed by the magistrate on a charge of an attempted criminal trespass, an offence punishable under s 447 and s 511 of the Penal Code.

[2] According to the magistrate the provisions under s 447/s 511 of the Penal Code carries the punishments of imprisonment which may extend to six months or with fine or with both.

[3] On perusing the charge sheet, I found the charge proffered against Mohamad Hazwan bin Hassan, OKT1 and Muhamad Zaid bin Zainal, OKT2 ('the respondent') for an offence of attempted criminal trespass punishable under s 447/s 511 of the Penal Code read with s 34 of the same Code. The charge reads as follows:

NIBONG TEBAL REPOT: 5298/12

PERTUDUHAN

Bahawa kamu bersama-sama pada 6.11.2012 jam lebih kurang 1.40 pagi di rumah No 1, Lorong Sintar Indah, Nibong Tebal, dalam Daerah Seberang Perai Selatan, dalam Negeri Pulau Pinang telah melakukan pencerobohan rumah dengan cuba memasuki rumah milik Chow Chin Keong No KP: 611228-08-5323 yang digunakan sebagai tempat kediaman dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 447/511 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun Keseksaan.

sgd

Timbalan Pendakwa Raya

Mahkamah Majistret Jawi

Seberang Perai Selatan.

HUKUMAN

Penjara boleh sampai enam (6) bulan atau dengan denda boleh sampai tiga ribu ringgit (RM3,000) atau kedua-duanya.

[4] The charge was authenticated by learned deputy attached at Jawi Magistrate's Court, Seberang Perai Selatan. Below the signature of the learned deputy, it stated the punishment of the offence for which the accused was charged, that is, the imprisonment which may extend to six months or fine that may extend to RM3,000 or both. At the reverse of the charge sheet, it was stated that the respondent was arrested on 6 November 2012.

[5] A brief chronology of events that led to the conviction and sentence of the respondent may be summarised as follows.

[6] On 6 December 2012 the respondent and OKT1 were first charged at the Jawi Magistrate's Court. The charge was read and explained to the respondent and OKT1. Both of them understood the charge and claimed trial to the charge. A bail of RM8,000 with one surety each was offered to the respondent and OKT1. However, both the respondent and OKT1 pleaded for the amount of the bail to be reduced, but the amount of RM8,000 with one surety was still maintained.

[7] The court adjourned the case to 8 January 2013 for mention to ascertain whether the documents (believed to be the documents under s 51A of the Criminal Procedure Code) have been served on the respondent and OKT1. And also to ascertain the appointment of counsel for the respondent and OKT1.

[8] On 8 January 2013 OKT1 and his counsel, Encik Tharuma Ratnam were present in court but not the respondent. OKT1 informed the court that the respondent was attending a robbery trial at Alor Star Court, and thus explained his absence that day. OKT1 still maintained the plea of not guilty to the charge. The notes of proceedings also showed that the learned deputy was prepared to serve the s 51A of the CPC documents on the accused. The case was adjourned to 1 February 2013 for mention.

[9] On 1 February 2013 OKT1 was present in court and the learned deputy informed the court that the respondent was involved in a criminal trial in Kuantan and the sentence had been passed on him on 25 January 2013. The court stood down the case. On continuing the case, learned deputy informed the court that the respondent was sentenced to 14 months imprisonment from the date of his arrest, and was serving sentence in Penor Prison, Kuantan. The case was put to 8 February 2013.

[10] On 8 February 2013 the respondent and OKT1 were present in court. The respondent informed the court that he was currently imprisoned for an offence under s 379A of the Penal Code. The charge was read and explained to OKT1 and he still claimed trial to the charge. Similarly, the charge was read and explained to the respondent, he, however, changed his plea to one of guilty, having understood the nature and consequences of his plea. Thereafter, the record showed the case was stood down.

[11] Upon resumption, the learned deputy tendered a written facts of the case which was marked as P1.

FAKTA KES

NO. KES	:	83-975-12/12
PENGADU		PANG WAY KEN (NO. KP: 960322-07-5055)
OKT	:	MOHD ZAID B. ZAINAL (NO. KP: 810508-02-6071)
KESALAHAN		SEK. 447/511 KANUN KESEKSAAN

KETERANGAN KES

1. Pada 6.11.2012 jam lebih kurang 1.40 pagi, ketika Pengadu sedang bermain komputer di bilik tidur tingkat atas rumah No 2, Lorong Sintar Indah 12, Taman Sintar Indah Nibong Tebal telah melihat sebuah kereta Honda warna merah di sebelah rumah jirannya di mana terdapat 2 (L). Salah seorang lelaki tersebut memegang cutter sedang memotong pintu pagar rumah jirannya. Kemudian, Pengadu melihat kedua-dua (L) tersebut melarikan diri dengan kereta Honda apabila menyedari kehadiran sebuah motosikal yang melalui kawasan rumah tersebut. Pengadu kemudiannya meminta bantuan anggota sukarelawan di kawasan perumahan tersebut. Satu laporan polis seperti mana Nibong Tebal rpt. 5298/12 telah dibuat mengenai kejadian ini.
2. Seterusnya pada 6.11.2012 jam lebih kurang 0200 hrs, Insp. Hafiz bersama-sama sepasukan anggota semasa bertugas ronda cegah jenayah kawasan Nibong Tebal telah menerima maklumat awam berkenaan kejadian pecah rumah. Setibanya di Jalan Besar Nibong Tebal berhampiran Taman Residensi Merbuk, didapati sebuah motokar jenis Honda PKR 94 telah terbabas dan melanggar tiang telefon di tepi jalan.
3. Pihak polis perkenalkan diri kepada (1) (L) (M) yang berada di bahagian pemandu iaitu Mohamad Hazwan Hassan (OKT1) serta 1 (L) (M) yang bersembunyi di dalam longkang di hadapan kawasan tersebut iaitu Muhammad Zaid Zainai (OKT2). Kedudukan OKT2 ditemui hasil maklumat orang awam yang berada di tempat kejadian. Pihak polis beritahu kesalahan dan tahan kedua-dua (L) (M) tadi.
4. Hasil siasatan oleh Pegawai Penyiasat Insp. Saiful mendapati kedua-dua OKT melakukan kesalahan seperti mana pertuduhan.

TPR NUR FARHANA HASHIM

PULAU PINANG

[12] The statement of facts, P1 was read to the respondent in Bahasa Malaysia which he admitted to be true. Then followed by the tendering of Nibong Tebal Report 5298/12 and Nibong Tebal Report 5299/12 which were marked as P2 and P3 respectively. The learned deputy also tendered 20 pieces of photograph which was marked as P4. The respondent admitted the exhibits to be correct.

[13] The respondent mitigated that he had five children and a wife who was

just recently employed. He had repented and prayed for a lenient sentence to commence from the date of his arrest. He also informed the court that he had been in remand for the last three months. Finally, the respondent requested to be sent to Tapah Prison.

[14] In reply, the learned deputy informed the court the respondent had no previous conviction (Note: This statement was inconsistent as the respondent was currently serving sentence in Penor Prison, Kuantan). The learned deputy requested the court to pass a reformatory sentence on the respondent.

[15] The notes of proceedings showed that the respondent was found guilty and convicted. He was sentenced to seven months of imprisonment from the date of arrest. As I have alluded above, the date of the respondent's arrest was on 6 November 2012.

[16] Before I move on, let me say something on the recording of the plea of guilty from the accused person by the magistrate. The notes of evidence did not show that the magistrate was satisfied that the respondent's plea of guilty was unqualified, un equivocal and the plea was accepted by the magistrate. This should be done after the accused has admitted the facts of the case tendered by the prosecution to be true. The necessity of recording that the court has accepted the guilty plea of the accused was emphasised in the case of *Mohammad bin Hassan v Public Prosecutor* [1998] 5 MLJ 65 by Augustine Paul JC (as he then was) as follows.

> The record must show that the plea of the accused has been accepted before recording a conviction (see *Public Prosecutor v Yiap Tai Juan & Ors* [1957] MLJ 38 (HC) and *Public Prosecutor v Tengku Hitam* [1962] 1 MLJ 414). A confession of guilt does not become a plea of guilty unless and until it is accepted. If not accepted, the confession ought not be recorded. In such cases, the practice is to treat it as a plea of not guilty (see Sarkar, *Criminal Procedure Code* at p 451 cited with approval in *Lee Weng Tuck & Anor v PP* at p 147).

His Lordship went on to say at p 75 as follows:

> Exhibit P2 is the written statement of facts tendered by the prosecution. The law that I have adverted to make it manifestly patent that the facts must be explained to the accused to enable the magistrate to satisfy himself that the accused intends to admit, without qualification, the offence alleged against him. The record does not show that the facts were explained to the accused. As I mentioned in the early part of this judgment, there is also no certainty that the facts as contained in exh P2 were admitted by the accused. These breaches violate s 173(b) of the CPC. The record also does not disclose that the plea was accepted by the learned magistrate. This failure violates s 173(m)(2) of the CPC. As I said earlier, a confession of guilt does not become a plea of guilty till it is accepted. It is a cardinal principle of law that a plea of guilty must be completely unreserved, unqualified and unequivocal (see *Public Prosecutor v Cheah Chooi Chuan* [1972] 1 MLJ 215 (HC)). The breaches in

this appeal revolt against the arriving at such a finding. It follows that the conviction and sentence of the accused cannot be sustained in law.

[17] In *Muhammad bin Hassan*'s case, the guilty plea of the accused was set aside and in the exercise of His Lordship's powers of revision, substituted it with a plea of not guilty and remitted the case back to the Magistrate's court for trial.

[18] Beside the proper recording of the plea of guilty, the Magistrate too must verify that the statement of facts, P1 should be supportive of the charge. I have had occasion to deal with this matter in *Lim Hong Siang v Public Prosecutor* [2009] 3 MLJ 280 albeit on the inclusion of inadmissible, irrelevant and highly prejudicial evidence against the accused in the statement of facts.

[19] In this case, the charge was for an offence of attempted criminal trespass on house *No 1*, Lorong Sintar Indah, Nibong Tebal, belonging to Chow Chin Keong, No KP 611228-08-5323. The statement of facts, P1, however, does not disclosed who is the owner of house No 1 which is an essential ingredient of an offence under s 447. Instead the facts emphasised on the identity and address of the complainant of the case, namely, Pang Way Ken, No KP 960322-07-5055, who lived at No 2, Lorong Sintar Indah 12, Taman Sintar Indah, Nibong Tebal. Pang Way Ken was a neighbour of Chow Chin Keong who lived in front of the latter's house, (see Nibong Tebal Report 5298/12, P2). In other words, Chow Chin Keong's house was located at the rear of Pang Way Ken's house.

[20] The statement of facts, P1 too does not disclosed the fence/gate of whose house was cut with the cutter. Was it the house of Chow Chin Keong? Was the respondent or another person who committed it? Was the offence committed with common intention? The facts do not state the nexus between the respondent and the attempted crime and whether there is common intention. It is insufficient to merely state both the accused (ie OKT1 and the respondent) who committed the offence as charged as in the last paragraph of the statement of facts, P1 which read as follows:

Hasil siasatan oleh Pegawai Penyiasat Insp Saiful mendapati kedua-dua OKT melakukan kesalahan seperti mana pertuduhan.

[21] Further, the statement of facts, P1 was tendered as part of the respondent's case which was for disposal as he pleaded guilty to the charge. It is, therefore, prejudicial and unfair to mention and implicate OKT1 in the facts as he does not confess his guilt. Any reference to OKT1, should be referred as 'another person'.

[22] It is suggested, by way of illustration, the last paragraph of the statement

of facts may be presented in this way. A police investigation revealed that the respondent (or another person) had cut the fence/gate using a cutter in an attempt to enter into the house No 1, Lorong Sintar Indah, Nibong Tebal, belonging to one Chow Chin Keong, No KP 611228-08-5323. The police investigation also revealed that the respondent and another person proceeded to the said house in a Honda motorcar and hurriedly escaped from the scene of crime in the said Honda which veered off the road and collided into the lamp post. The respondent and another person who shared a common intention to commit the crime were subsequently arrested.

[23] Now I come for the issue of the sentence imposed by the magistrate on the respondent which necessitated him to write the letter dated 8 February 2013 to this court for revision. The records of proceedings showed that the respondent was sentenced to seven months of imprisonment from the date of arrest ie 6 November 2012. Presumably the magistrate realised that the sentence he passed on the respondent was in excess of six months as stated at the bottom of the charge.

[24] The charge in this case was under the provisions of s 447/511 of the Penal Code read together with s 34 of the same Code. It was a case of an attempted criminal trespass. The pertinent sections of the Penal Code read as follows:

> Punishment for criminal trespass
>
> s 447 Whoever commits criminal trespass shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to three thousand ringgit, or with both.
>
> Punishment for attempting to commit offences punishable with imprisonment
>
> s 511 Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishment, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

[25] Criminal trespass is defined in s 441 of the Penal Code. The section has three essential ingredients. They are:

(a) entry into or upon property in the possession of another;

(b) if such entry is lawful then unlawfully remaining upon such property;

(c) such entry or unlawful remaining must be with intent:

(i) to commit an offence, or

(ii) to intimidate, insult or annoy the person in possession of the property.

[26] As can be seen, the punishment for criminal trespass is imprisonment which may extend to six months, or with fine which may extend to three thousand ringgit or with both.

[27] When s 447 is read with s 511, 'any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence,' meaning to say, the imprisonment shall not be more than three months which is one-half of the six months.

[28] Thus, the maximum imprisonment term imposable for an offence of an attempted criminal trespass is one that may extend to three months and not six months as understood by the magistrate. It is clear that, as from the date of his arrest, 6 November 2012 up to the date of his conviction and sentence by the magistrate on 8 February 2013, the respondent had already served his sentence for a period of three months and two days, thus exceeding two days of his maximum sentence under s 447/511. Therefore the imprisonment term of seven months imposed by the magistrate in this case is not in accordance with the law and therefore illegal. It is ultra vires.

[29] The fourth issue is relating to the charge. The charge is seriously flawed or bad in law. I have written no less than seven grounds of decision on defective charges under various statutes. The reported cases were *Basri Md Desa v Public Prosecutor* [2010] MLJU 1030; [2011] 1 CLJ 884, *Takrip dan Sembilan Belas Orang Yang Lain v Pejabat Imigresen Negeri Melaka* [2004] MLJU 359; [2004] AMR 698, *Public Prosecutor lwn Mohamad bin Sabu* [2012] 7 MLJ 547; [2011] 6 AMR 250, *Choong Loke Kian dan satu lagi v Pendakwa Raya* [2013] 1 MLJ 436; [2012] 1 LNS 176, *Ng Yu Wah v Public Prosecutor* [2012] 9 MLJ 325; [2012] 4 CLJ 494 and the most recent was *Abd Rashid Abdullah & Anor v Public Prosecutor* [2012] MLJU 1427; [2013] 2 AMR 484. In *Mohamad bin Sabu*'s case, this was a case where the accused was charged with an offence of voluntarily obstructing a public servant in discharge of his public functions. The charge failed to incorporate the mens rea element that the accused had voluntarily obstructed the public servant and also there was an obvious omission of the expression 'in the discharge of his public functions' which form the two essential ingredients of the offence charged. The prosecution's appeal was dismissed.

[30] In the present case, the charge too did not state the mens rea or intent of

the offence 'to commit an offence, or to intimidate, insult or annoy any person in possession of the property'. *Ratanlal and Dhirajlal's Law of Crimes* (24th Ed), Vol 2 has this to say pertaining to the charge under s 447 at p 2197 as follows:

> 8 Charge - A charge under this section should specifically state the intent which is alleged and if that intent is to intimidate, insult or annoy any person in possession of the property the name of that person should also be stated.

[31] The charge is further bad in law — firstly, an improper word or expression were incorporated in the charge. The words 'pencerobohan rumah' are inaccurate and instead it should read 'pencerobohan jenayah'. It would appear that the learned deputy who framed the charge was mixed up and confused with s 448 of the Penal Code which deals with the punishment of house trespass. Secondly, the expression 'yang digunakan sebagai tempat kediaman', the learned deputy is muddled up with the ingredient of an offence of theft in dwelling house under s 380 of the Penal Code. The phrase 'yang digunakan sebagai tempat kediaman' is certainly not the mens rea of the offence, neither the main ingredient of the offence of criminal trespass under s 447. Thus the respondent's plea of guilty was entered under an erroneous view of the law, his conviction cannot stand.

[32] Having regard to the aforesaid defects, the charge in this case is therefore fundamentally defective and the defects which are multiple are not curable under s 422 of the Criminal Procedure Code. To enable a prima facie case to be established the prosecution must prove the main ingredients of the charge: see *Public Prosecutor v Mohd Azam bin Basiron & Anor* [2011] 3 MLJ 741; [2010] 9 CLJ 1.

[33] The duty to ensure that the charge is properly frame is not only the responsibility of the Magistrate, but also mainly the duty of learned deputy to see that it is in accordance with the law as the charge is instituted at the instance of the prosecution. For guidance of the lower court, a proper charge under s 447/s 511 read together with s 34, as in the instant case, is as follows:

> BAHAWA kamu bersama-sama pada 6.11.2012, jam lebih kurang 1.40 pagi di rumah No 1, Lorong Sintar Indah 13, Taman Sintar Indah, Nibong Tebal, dalam Daerah Seberang Perai Selatan, di dalam Negeri Pulau Pinang dalam mencapai niat kamu berdua telah melakukan pencerobohan jenayah dengan cuba memasuki rumah yang dimiliki oleh Chow Chin Keong, No KP 611228-08-5323 dengan niat untuk:
>
> 1) melakukan suatu kesalahan,
>
> Dan kamu adalah dengan ini melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 447/511 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[34] In the upshot in the exercise of my revisionary powers, I set aside the conviction and sentence imposed by the magistrate but I am not in a position to remit back the case to Jawi Magistrate's Court because of several breaches or defects and one of which amounts to an illegality and ultra vires which is incurable under the CPC. The accused is thereby acquitted and discharged.

Conviction and sentence set aside and respondent acquitted and discharged.

Reported by Kanesh Sundrum

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